71-1671

Supreme Court, U. S.
FILED
JUN 23 1972
JAMES R. BROWNING, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

KANSAS CITY, A MISSOURI MUNICIPALITY,
Petitioner,

vs.

CLAUDE G. WEBB, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, EN BANC

AARON A. WILSON
City Counselor

NED B. BAHR
Associate City Counselor
2800 City Hall
Kansas City, Missouri 64106
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Constitutional Provisions, Statutes, and Charter Provisions Involved 5

Statement of the Case 6

Reasons for Granting the Writ—

1. The mandate of the Missouri Supreme Court En Banc, being one of first impression, has created a new right under the guise of equal protection of the laws provisions of the United States and Missouri Constitution to the detriment of petitioner's legislative body and petitioner's electorate 10

2. The decisions relied upon by the Missouri Supreme Court En Banc and enunciated by this Honorable Court are not analogous to the facts in the present case and this being a case of first impression involving an important public interest it should be settled by this Court 12

Conclusion 15

Appendix A—Opinion, Supreme Court of Missouri En Banc A1

Appendix B—Motion of Respondent for Rehearing or in the Alternative to Transfer to the Supreme Court En Banc A21

Appendix C—Notice of Intent of Respondent Kansas City, a Missouri Municipality, to Seek Writ of Cer-

tiorari from Supreme Court of United States to Supreme Court of Missouri, En Banc, and Motion for Stay of Execution of Mandate A25
Appendix D—Stay of Mandate A27

Table of Authorities

Cases

Dohany v. *Rogers, Commissioner,* 50 S.Ct. 299, 281 U.S. 362, 74 L.Ed. 904 ..... 6, 14, 15
Kansas City v. *Bacon,* Mo. Sup., Banc, 57 S.W. 1045 ..... 5, 14
Kansas City v. *Baird,* Mo. Sup., 11 S.W. 243 ..... 5, 13
Kansas City v. *Smart,* Mo. Sup., 128 Mo. 272, 30 S.W. 773 ..... 5, 12
Kansas City v. *Vineyard,* Mo. Sup., 128 Mo. 75, 30 S.W. 326 6
Mallette v. *United States,* CCA 8th Cir., 137 F.2d 95 ..... 6, 14
Port of New York Authority v. *Heming,* N.J. Sup., 167 A.2d 609, certiorari denied and appeal dismissed, 81 S.Ct. 1676, 367 U.S. 487, 6 L.Ed.2d 1241 ..... 6, 10, 14, 15
Uhlmann v. *Wren,* Ariz. Sup., 97 Ariz. 366, 401 P.2d 113 ..... 6, 14
Williams v. *Florida,* 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed. 2d 446 ..... 6, 14

Constitutional Provisions and Statutes

Constitution of the United States, Fourteenth Amendment 2, 3, 4, 5
Constitution of the State of Missouri 1945, Section 2, Article I (equal protection or opportunity under the laws) 5
Constitution of the State of Missouri 1945, Section 26, Article I (just compensation) 5

Constitution of the State of Missouri 1945, Section 4, Article XI (trial by common law jury—incorporated companies) 5

Section 523.060 RSMo. 1959 (Laws of Missouri 1945, p. 1072) 5

Section 88.073(2) RSMo. 1959 (Section 7240 Revised Statutes 1939, as amended in 1949 by H. B. 2036 effective April 14, 1950) 5, 9

CHARTER PROVISIONS

Article I, Section 1(9), Constitutional Charter of Kansas City, Mo. 5

Article VI, Section 128 et seq. Constitutional Charter of Kansas City, Mo. 5

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

KANSAS CITY, A MISSOURI MUNICIPALITY,
Petitioner,

vs.

CLAUDE G. WEBB, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, EN BANC

Petitioner, Kansas City, a Missouri municipality, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in this proceeding on June 14, 1971, by Division No. 1 of said Court, and upon rehearing by motion granted to petitioner, said divisional opinion was affirmed by the Missouri Supreme Court En Banc on March 13, 1972. Thereafter, petitioner filed a Notice of Intent to seek a writ of certiorari from the Supreme Court of the United States directed to the Supreme Court of Missouri En Banc and also a Motion for Stay of Execution of the mandate sought to be reviewed. The Supreme Court of Missouri En Banc did order on March 23, 1972, that the mandate be stayed for a period of ninety (90) days from that date. Upon granting of this petition, the petitioners further respectfully pray that this Court summarily re-

verse the judgment (mandate of the Missouri Supreme Court En Banc) and reinstate the trial court judgment(s) heretofore made on November 3, 1969, January 26, 1970, and the final judgment of the trial court of November 18, 1969. The mandate of the Missouri Supreme Court En Banc is decisive of a question of *first impression* presented to that court and involves a construction of the Constitution of the State of Missouri and the Fourteenth Amendment to the United States Constitution with respect to the question of equal protection of the laws. Oral argument is requested.

The petitioner is exercising its power of eminent domain to obtain water and sewer easements through the lands of the respondents both permanent and temporary (the temporary easements being for the period of construction to store materials, earth, equipment, etc.) further details concerning the case will be found under "statement of the case".

OPINIONS BELOW

The initial opinion of the Missouri Supreme Court was entered by Division No. 1, and thereafter upon motion by petitioner for rehearing or in the alternative to transfer to the Missouri Supreme Court En Banc was granted, the opinion of said Division No. 1 was affirmed and adopted by the Missouri Supreme Court En Banc. Said divisional opinion was entered on June 14, 1971, and thereafter adopted by the Supreme Court of Missouri En Banc on March 13, 1972, and appears as Appendix A. The motion for rehearing or in the alternative to transfer to the Supreme Court En Banc by petitioner appears as Appendix B. After the En Banc decision was made, petitioner filed its Notice of Intent to seek the within writ of certiorari and said motion appears as Appendix C. The

Missouri Supreme Court En Banc did on March 23, 1972, stay the mandate for a period of ninety (90) days from and after March 23, 1972, and this appears as Appendix D. The opinion of the Missouri Supreme Court En Banc has not been officially reported.

JURISDICTION

The final judgment of the Missouri Supreme Court En Banc was entered on March 13, 1972, after all exhaustive remedies had been taken by the petitioner herein. The construction of the Constitution of the United States (Amendment Fourteen) and of the corresponding provisions of the Missouri Constitution was made, contrary to petitioner's position. This petition for a writ of certiorari is filed within the ninety (90) days granted by the Missouri Supreme Court En Banc, pursuant to its order of March 23, 1972 (see Appendix D), staying the mandate of the Supreme Court of Missouri En Banc. The jurisdiction of this Honorable Court is invoked under 28 USC Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the *new right* created by the decision under review of the Missouri Supreme Court En Banc of granting to an individual landowner in an eminent domain proceeding brought under petitioner's constitutional charter for local self-government to have a trial by a common law jury of twelve persons as an incorporated company has, *pursuant to the Missouri State Constitution,* when the charter of petitioner provides that an individual owner of land subjected to the power of eminent domain has a *right* only to a trial before a jury selected by the trial judge of six (6) disinterested resident freeholders of the petitioner, is a denial of the equal protection of the

laws under Amendment Fourteen of the United States Constitution?

2. Does the legislative body of petitioner (Mayor and City Council) have the sufficient power in its legislative and discretionary capacity to select the tribunal (6 disinterested resident freeholders or a jury of twelve persons commonly known as a common law jury) pursuant to the applicable provisions of its constitutional charter, thereby denying no person of the equal protection of the laws?

3. Is there proper and reasonable classification which does not violate the equal protection of the laws provisions of the Fourteenth Amendment to the United States Constitution when such classification was made the qualified voters of the State in adopting the Constitution of Missouri of 1875 and of the Constitution of Missouri of 1945 in determining that an incorporated company (for profit) for or against which the power is exercised, has a right to a trial before a common law jury of twelve (12) persons, where a reasonable basis for the classification exists?

4. Is the right of the citizen greater than or subordinate to the rule of the majority when the majority votes in adopting a charter for a local self-government and included therein is a classification for the tribunal before which a determination of just compensation will be made as to individual and corporate owners of land involved, especially where the Constitution of the State of Missouri adopted by the electorate provides that incorporated companies for profit shall have the right upon their timely election to request a trial by common law jury of twelve (12) persons?

5. Is the basis for classification to the effect that a corporate entity is entitled to a trial by common law jury

of twelve (12) persons proper when it is to insulate such corporation from the prejudices of people against such for profit corporate entities?

CONSTITUTIONAL PROVISIONS, STATUTES, AND CHARTER PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment (equal protection of the laws)

Constitution of the State of Missouri 1945, Section 2, Article I (equal protection or opportunity under the laws)

Constitution of the State of Missouri 1945, Section 26, Article I (just compensation)

Constitution of the State of Missouri 1945, Section 4, Article XI (trial by common law jury—incorporated companies)

Section 523.060 RSMo. 1959 (Laws of Missouri 1945, p. 1072)

Section 88.073(2) RSMo. 1959 (Section 7240 Revised Statutes 1939, as amended in 1949 by H. B. 2036 effective April 14, 1950)

Article I, Section 1(9), Constitutional Charter of petitioner

Article VI, Section 128 et seq. Constitutional Charter of petitioner

Cases Cited

Kansas City v. *Bacon*, Mo. Sup., Banc, 57 S.W. 1045

Kansas City v. *Smart*, Mo. Sup., 128 Mo. 272, 30 S.W. 773

Kansas City v. *Baird*, Mo. Sup., 11 S.W. 243

Kansas City v. *Vineyard*, Mo. Sup., 128 Mo. 75, 30 S.W. 326

Port of New York Authority v. *Heming*, N.J. Sup., 167 A.2d 609, certiorari denied and appeal dismissed, 81 S.Ct. 1676, 367 U.S. 487, 6 L.Ed.2d 1241

Dohany v. *Rogers, Commissioner*, 50 S.Ct. 299, 281 U.S. 362, 74 L.Ed. 904

Mallette v. *United States*, CCA 8th Cir., 137 F.2d 96

Uhlmann v. *Wren*, Ariz. Sup., 97 Ariz. 366, 401 P.2d 113

Williams v. *Florida*, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446

STATEMENT OF THE CASE

Petitioner is a municipal corporation of the State of Missouri and under its Constitutional Charter framed pursuant to the provisions of Article IX, Section 16 of the Constitution of Missouri of 1875 (now Article VI, Section 19, Constitution of Missouri 1945) has and does exercise the power of eminent domain to condemn interest in land for any proper public or municipal use or purpose. The present case involves the taking by eminent domain of permanent sewer and water line easements together with appropriate temporary construction easements to install a public improvement. The procedure that petitioner followed is in accordance with Article VI, Sections 128 et seq. of its Constitutional Charter. Briefly, this involved the empaneling of a six (6) man disinterested resident freeholder jury which is summoned by the trial judge, which in turn after evidence is presented and a personal inspection of the property made by said six (6) man jury, and upon appropriate instruction by the trial judge returns its verdict in writing signed by each of them.

In the instant case, the petitioner sought to obtain easements for a force main for sewerage purposes together with an accompanying easement within the permanent right of way for a water line use. The trial court and the Missouri Supreme Court En Banc found that such taking was for a proper public purpose. After the verdict was returned the petitioner satisfied said verdict by the payment of Two Hundred Dollars ($200.00) into the registry of the Court for the benefit of the respondents herein. Thereafter, petitioner prosecuted the public improvement after paying the compensation into the registry of the Court.

The landowners respondents timely raised their request for a trial of their determination for compensation by a tribunal composed of twelve (12) people, commonly known as a common law jury. This is not in accord with the petitioner's Constitutional Charter provisions. The question of an alleged denial of equal protection of the laws arises because the Constitution of the State of Missouri states that a for-profit corporation has such right whenever the power is exercised for or against such corporation. Thus, the landowners herein claim such denial even though the Charter of petitioner does provide for such situation (see Section 147, Article VI, Charter of Petitioner), but respondents herein do not fall within the class or qualify as a for-profit corporation which would entitle them to such a tribunal composed of twelve (12) persons.

Petitioner through its legislative body (Mayor and City Council) in the exercise of its legislative discretion did have the power to provide for a different procedure which would have allowed the respondents landowners herein to a trial by a common law jury of twelve (12) persons. However, in the ordinance condemning the ease-

ments required for the construction of the public improvement, provision was made that execution of the proceedings should be under Article VI of petitioner's constitutional Charter or under Chapter 523 of the Revised Statutes of Missouri 1959, as amended (and as supplemented by Supreme Court Rule 86) or by any other method authorized by law for the determination of the payment of just compensation. City Counselor was authorized to select the method of procedure and did so by prosecuting the action under Article VI of petitioner's constitutional Charter which provided for the six (6) disinterested resident freeholders to be selected by the trial judge.

While the en banc decision of the Missouri Supreme Court did not hold petitioner's constitutional Charter procedure for exercising the power of eminent domain unconstitutional it did work to deprive the electorate of petitioner (as well as the rest of the electorate within the State of Missouri) of its right to determine the organic law by which its people will be governed. That is to say, the electorate had been deprived of their franchise by a judicial decree. Kansas City's first home rule charter was adopted in 1889, it being governed theretofore by special acts of the legislature of the State of Missouri. Its present Charter was adopted in 1925 and since that time has been amended by vote of the people some thirty or more times.

The effect is to deprive the petitioner's legislative body from selecting the mode of procedure which was a grant to the City as well as to the State of Missouri contrary to the majority rule principle. The only reason petitioner's Charter contains the right of a for-profit corporation to have its trial before a common law jury of twelve (12) persons is because the State Constitution contains a provision guaranteeing that right. Therefore, not to be out of harmony with the laws and Constitution of the State

of Missouri, petitioner had to include or else, had it excluded such provision (see Section 147, Article VI, petitioner's constitutional Charter) such right whenever a for-profit corporation was condemned it would have by the State Constitution that right. Also, there was no right at common law to have a trial by a common law jury of twelve (12) persons nor does the Constitution of Missouri or of the United States guarantee such right. Had such right existed prior to the adoption of the United States Constitution then the United States Constitution and all state Constitutions would have guaranteed any rights that existed and would have preserved those rights. However, not being preserved since the right did not exist and of a Constitution not guaranteeing such right, the right still does not exist unless in a State Constitution or state law such right is given. Even the State of Missouri did not intend through its general assembly when it passed the law noted as Section 88.073(2) to grant such right but merely said that any constitutional Charter city may exercise a power of eminent domain as prescribed by its Charter or in accord with this chapter. While petitioner is in harmony with the laws of the state and the state Constitution, the Missouri Supreme Court En Banc has now denied the electorate of petitioner as well as the electorate of the entire state the right to determine whether or not the trial by compensation of any condemnee shall be by a jury of twelve (12) persons. That is the effect of this decision.

REASONS FOR GRANTING THE WRIT

1. The mandate of the Missouri Supreme Court En Banc, being one of first impression, has created a new right under the guise of equal protection of the laws provisions of the United States and Missouri Constitution to the detriment of petitioner's legislative body and petitioner's electorate.

The effect of the mandate of the Missouri Supreme Court En Banc is to deprive its electorate of an effective exercise of the franchise to adopt a Charter for local self-government. Also, it deprives the electorate of the State of Missouri that effective right when that electorate adopted the Constitution of Missouri of 1875 and the Constitution of Missouri of 1945 respecting the tribunal before which compensation was to be determined in eminent domain cases. Instead of petitioner's legislative body (Mayor and City Council) having the legislative discretion to select the mode of procedure, the mandate of the Missouri Supreme Court En Banc has given this right by creating a new right to the particular land owner when such right did not heretofore exist.

Petitioner did cite to the Supreme Court of Missouri En Banc, authorities from other jurisdictions. However, based upon the facts and the Court's decision in those instances the legislative bodies had the power to select the procedural method for determining compensation and before the particular tribunal. The most noteworthy is *Port of New York Authority* v. *Heming*, N.J. Sup., 1961, 167 A.2d 609, certiorari denied and appeal dismissed, 81 S.Ct. 1676, 367 U.S. 487, 6 L.Ed.2d 1241. Since Certiorari was denied in the case, petitioner submits that the instant case should be reviewed on the writ of certiorari prayed for because upon execution of the mandate of the Missouri Supreme Court En Banc will result in chaotic conditions

for the trial of eminent domain cases by petitioner. This is so because petitioner has many instances where private properties are condemned and the assessment of benefits throughout a benefit district is required. The instant case did not involve a benefit district whereby the jury would be required to make assessments throughout such benefit districts for specially benefited properties, by reason of the proposed public improvement. Where a condemnation proceeding brought by petitioner involves perhaps several hundred property owners as condemnees and a benefit district involving many more hundreds or perhaps a thousand within a benefit district, is each individual land owner, be it corporate or otherwise, entitled to a separate trial by a common law jury of twelve (12) persons to determine the compensation? If this be the case, petitioner is then virtually stripped of its power to construct public improvements, one of its primary functions as a municipal corporation.

By creating this "new right" in the land owners to select the tribunal the Missouri Supreme Court En Banc has judicially legislated all contrary to the electorate of the State of Missouri and of the electorate of petitioner when they adopted the Constitution of Missouri and the Charter of petitioner. When the equal protection of the laws clause is viewed from the petitioner's side, it shows that the electorate are being deprived of their effective exercise of their franchise in adopting by vote the laws by which they desire to be governed.

With respect to the exercise of the power of eminent domain and the tribunal selected by the Federal District Judge, see commentaries under Rule 71A, Federal Rules of Procedure.

2. The decisions relied upon by the Missouri Supreme Court En Banc and enunciated by this Honorable Court are not analogous to the facts in the present case and this being a case of first impression involving an important public interest it should be settled by this Court.

Upon reviewing the mandate of the Missouri Supreme Court En Banc, it is evident that the principles upon which they relied and enunciated by this Honorable Court are not analogous to the fact situation involved in this condemnation proceeding. While petitioner does not disagree with any of the holdings in those cases yet the fact situations therein do not compare with the principle applied, that is a claimed denial of equal protection of the laws under the facts of this case (See pp. A13-A14, Appendix A). *No incorporated company was involved in this case.*

The laws of Missouri under its Constitution as well as the petitioner's Charter, and those of all of the other states of the Union, do not find a place where a corporate entity is allowed the privilege of franchise at the polls. Since corporations are artificial bodies for business, charitable or otherwise different purpose, they take subject and are subordinate in a way to the people who have the franchise and vote the laws. Petitioner does agree that a corporation has been treated as a "person" under certain circumstances, and since they are not real people the law has sought in the instance of the present case to classify them and to *insulate* them from the possible prejudices that people may have toward them (See *Kansas City* v. *Smart*, Mo. Sup., 1895, 30 S.W. 773). This is especially true in a for-profit corporation. The basis for the classification probably finds itself in history at the time when the railroads were being developed throughout the nation. As a consequence with railroad corporations traversing entire states, and eventually the nation, any prejudices were

thereby created and propagated. Thus, in order to insulate the railroad corporation or other corporations who were in business for profit, the people of the State of Missouri sought to provide them with a tribunal which would give them a fair trial by requiring the question of compensation to be determined before a twelve (12) man jury rather than some other tribunal. There is no reason to think today that people sitting as jurors would not also have the same prejudices toward a corporate entity in business for profit, nor is there any reason to think that a six (6) man jury would do other than grant just compensation in cases decided by it.

For some reason unknown to petitioner, the Missouri Supreme Court En Banc thinks there must be some "magic" to a trial by jury of twelve (12) persons, neglecting many pronouncements of the appellate courts of Missouri to the effect that the six (6) disinterested resident freeholders hand picked by the trial judge are those persons picked for their particular qualifications, that the members composing same are informed upon the values of real property and improvements throughout the city and thereby being more astute and qualified in their determination for fixing the compensation in condemnation proceedings (See *Kansas City* v. *Baird,* Mo. Sup., 1889, 11 S.W. 243). A common law jury could be selected beyond the corporate limits of petitioner which goes against the provisions of petitioner's constitutional Charter to the effect that the compensation should be determined by six (6) disinterested *resident* freeholders hand selected by the trial judge. Of course, corporations involved in condemnation proceedings brought by petitioner can also waive their rights to a common law jury and in most instances they have done so. The mandate of the Supreme Court leaves much uncertainty. As previously mentioned it does not make clear whether or not each and every individual

land owner corporate or otherwise is entitled to a separate trial or whether or not these trials can be determined by one common law jury for more than one land owner. Nor does it take into account the assessment of benefits within a benefit district where such improvement is to be paid for by that method, sometimes involving hundreds of properties.

Petitioner submits that the Missouri Supreme Court En Banc did not take into adequate account or consideration its own pronouncement upon the Charter provisions of petitioner respecting eminent domain. Of note is the case of *Kansas City* v. *Bacon*, Mo. Sup. Banc, 57 S.W. 1045, l.c. 1051, nor did the Supreme Court En Banc appear to take note of the case of *Port of New York Authority* v. *Heming*, N.J. Sup., 1961, 167 A.2d 609, certiorari denied and appeal dismissed 81 S.Ct. 1676, 367 U.S. 487, 6 L.Ed.2d 1241. Also enunciating the principle was the case of *Dohany* v. *Rogers, Commissioner*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904, l.c. 912. Of similar effect is *Mallette* v. *United States*, CCA 8th, 1943, 137 F.2d 95, l.c. 96. Of similar import is the case of *Uhlmann* v. *Wren*, Ariz. Sup., 1965, 97 Ariz. 366, 401 P.2d 113, l.c. 127-129.

There was no showing that the instant landowners did not receive just compensation before the six (6) man jury empanelled. Landowners own a rather large tract of land within the corporate boundaries of Petitioner and received a most beneficial public improvement at no cost to them in the form of a sewer force main and water line, for which they would need to develop their lands to the highest and best use, i.e. for industrial purposes.

Interestingly enough, a jury of six persons found an individual guilty of robbery and the sentence was life imprisonment and was upheld by this Court in *Williams* v. *Florida*, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446.

Thus, the Missouri Supreme Court, En Banc by its opinion of March 13, 1972 has placed itself out of harmony with the principle enunciated in *Dohany* v. *Rogers, Commissioner, supra.* Since certiorari was denied in the *Port of New York Authority* v. *Heming* case, *supra,* the present writ should be granted in order to harmonize the law on the question of equal protection under the facts of this case.

CONCLUSION

By reason of the foregoing petitioner submits it has presented to this Honorable Court an important question involving the construction of equal protection of the laws section of the Fourteenth Amendment to the United States Constitution and a similar section in the Missouri Constitution with respect to a right by trial by jury in eminent domain cases, and that question is very important to petitioner as the exercise of the power of eminent domain is frequently used in order that petitioner may construct needed public improvements. To allow this decision of the Missouri Supreme Court En Banc to stand as is, would seriously hamper and virtually prevent petitioner from meeting its responsible municipal functions and duties to serve its citizens.

WHEREFORE, petitioner prays that this Honorable Court's writ of certiorari issue to the Missouri Supreme Court En Banc to review said Court's final decision under date of March 13, 1972, and to thereafter hear oral argu-

ments and quash said opinion and reinstate the judgments of the trial court therein mentioned.

Respectfully submitted,

AARON A. WILSON
City Counselor

NED B. BAHR
Associate City Counselor
2800 City Hall
Kansas City, Missouri 64106
CR 4-1210 (816)

Attorneys for Petitioner Kansas City, a Missouri Municipality

APPENDIX A

IN THE SUPREME COURT OF MISSOURI
COURT EN BANC

In re: CONDEMNING PRIVATE PROPERTY FOR PUBLIC USE FOR SEWER AND WATER RIGHTS IN KANSAS CITY, MISSOURI AND PROVIDING FOR PAYMENT OF JUST COMPENSATION THEREFOR, UNDER ORDINANCE NO. 35677, PASSED AUGUST 9, 1968.

Kansas City,
Condemnor-Respondent,
v.
Claude G. Webb and Coga Webb, Kenneth D. Brightwell and Martha Brightwell, and Bertha Bell,
Condemnees-Appellants.

No. 55,230
No. 55,432

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE PAUL E. VARDEMAN, JUDGE

(Filed March 13, 1972)

This is a condemnation proceeding commenced by the City of Kansas City, a constitutional charter city, by the filing in the office of the Circuit Clerk of Jackson County of its Ordinance No. 35677 condemning private property for public use for permanent sewer and water rights of way and temporary construction easements in connection with Pollution Control Project White Oak Pump Station and Force Main; providing for payment of compensation under Article VI of the Charter of Kansas City and for institution and prosecution of the proceedings under said

Article VI, or under RSMo 1959, Chapter 523, as amended, as supplemented by Supreme Court Rule 86, "or by any other method authorized by law for the determination of the payment of just compensation"; authorizing the city counselor to select the procedural method for such acquisition; providing that the landowners were to be conclusively bound by his selection; for payment of compensation from city funds, and that the improvements were to be available to serve the landowners within the limits of the watershed and giving them the right to make sewer connections therewith, the council determining that said lands were specially benefited by availability of the permanent sewer easements. Notice was published. Landowner Bertha Bell filed a petition alleging that she was entitled under the law of the land to a trial of her claims for compensation by a common law jury of twelve men, and demanded same. The circuit judge overruled her petition, whereupon Bertha Bell and landowners Webb and Brightwell filed answers denying that the proposed use is a public use; alleging that it is a private use of benefit to private land developers; that the city charter provisions for condemnation deny them equal protection of the laws as provided for in the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the state constitution, by authorizing compensation to be ascertained and assessed by a jury of six freeholders of the city at the election of the city while at the same time providing in Section 147 of the charter that if any incorporated companies subject to the same condemnation proceedings be entitled under the law of the land to trial of its claims for compensation by a common law jury of twelve persons it may demand and have such a trial; that no such protection is afforded individual condemnees. Landowners further alleged that the condemnation violates their constitutional rights under the Fifth and Seventh Amend-

ments, and deprives them of property without due process of law under the Fourteenth Amendment. They sought dismissal of the action, praying in the alternative for damages for $9,934.08 (Bell); and $9,426.25 (Webb and Brightwell).

The circuit judge selected six resident freeholders of the city who were sworn in and empaneled as a jury. The freeholders' jury rendered a verdict ascertaining that the Webbs and Brightwells had sustained no actual damages and awarding $200 for damages done to the Bell property over and above any special benefits accruing. The court accepted the verdict, allowed each of the six jurors a fee of $450 (three days each at $150 per day), a total of $2,700, and discharged the jury. The Webbs and Brightwells and Bertha Bell filed timely motions for new trial. The court, sitting without a jury, heard extensive oral evidence and considered 70 exhibits introduced on the issue of public or private use. The court made findings of fact and conclusions of law, overruled landowners' motions for new trial, found the taking was for a public and not a private use, upheld and sustained the constitutionality of the ordinance and procedure, confirmed the verdict of the jury, and ordered title in the easements vested in the city. Landowners appealed.

Landowners specifically and timely raised the constitutional question at the inception of these proceedings, preserved the same in the trial court, and have kept it alive on this appeal, whether in denying their demand for trial before a common law jury of twelve persons (a right afforded corporate condemnees in like circumstances) landowners were denied their right to equal protection of the laws under Amendment XIV to the Constitution of the United States and the equal rights and opportunity

accorded them under § 2 of Article I of the Constitution of Missouri, 1945.

The following constitutional, statutory and charter provisions are pertinent:

"No state shall * * * deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV, Constitution of the United States.

"* * * [A]ll persons are created equal and are entitled to equal rights and opportunities under the law; * * *." Article I, Section 2, Constitution of Missouri, 1945.

"* * * [P]rivate property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; * * *." Article I, Section 26, Constitution of Missouri, 1945.

"The exercise of the power and right of eminent domain shall never be construed or abridged to prevent the taking by law of the property and franchises of corporations and subjecting them to public use. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when the rights of any corporation are affected by any exercise of said power of eminent domain." Article XI, Section 4, Constitution of Missouri, 1945.

"Any plaintiff or defendant, individual or corporate, shall have the right of trial by jury of twelve persons, if either party file exceptions to the award of commissioners in any condemnation case." § 523.060, RSMo 1959 (Laws Mo. 1945, p. 1072).

"Whenever the charter of any constitutional charter city makes provision for the condemnation of property for

public purposes and assessment of benefits therefor, such city may elect to proceed with such condemnation or assessment, or both, in the manner provided in sections 88.010 to 88.070 or to proceed in the manner provided in its charter." § 88.073 (2) RSMo 1959 (§ 7240 RS 1939, as amended in 1949 by H.B. 2036, effective April 14, 1950).

"* * * Subject only to the necessary extent of the limitations imposed by the constitutions and laws of the United States and the State of Missouri, it [Kansas City] shall have power: * * * (9) To exercise the right of eminent domain and to condemn property, real or personal, or any right, interest, easement, restriction or use therein, within or without the city or state for any public or municipal use or purpose." Kansas City Charter, Article I, § 1.

"The city may exercise the power of eminent domain and the power of determining the damage caused to property by any public work or improvement or use, or restriction of use, and the power of making and levying special assessments, in the manner prescribed in this charter, or in any other lawful manner. And whenever any property, land, easement, right-of-way, use or right of any character is taken or damaged by the city for public use, just compensation shall be paid to the owner or owners thereof. Such compensation shall be ascertained and assessed by a jury of six (6) freeholders of the city, in the manner provided in this charter, or as otherwise provided by law. * * *" Kansas City Charter, Article VI, § 128.

"Upon the day fixed by the order and notice for the empaneling of a jury, or upon any day thereafter to which the proceedings in said cause have been continued or adjourned, the court shall empanel a jury of six (6) disinterested freeholders of the city, who shall receive the

same compensation as other jurors in such court. * * *" Kansas City Charter, Article VI, § 142.

"At the hearing of said cause the parties interested may submit evidence to said jury of freeholders [provided for in section 142] touching the matters under consideration. Such jury may examine personally each piece of property described on the map or plat filed in said cause as aforesaid, and all property claimed to be damaged, and the property, if any, to be assessed with benefits; and the city engineer, the director of public works, or the superintendent of parks, or any assistant of any of them, may accompany such jury for the purpose of pointing out the property aforesaid." Kansas City Charter, Article VI, § 144.

"If any incorporated company which may be interested in the whole or in any part of the land to be taken or damaged by the said proceedings, be entitled, under the law of the land, to trial of its claims for compensation therefor by a common law jury of twelve (12) men, it may at any time prior to the day fixed as herein provided for empaneling a jury, file in the office of the clerk of said court, a petition in which it shall state the description of the property owned or claimed by it so to be taken or damaged and the amount and nature of its claim therefor, and may further state that it demands a trial before a common law jury of twelve (12) men of its claim for compensation therefor. If any such incorporated company shall not so file such petition before such date, it shall be deemed and taken to have waived its right of trial by a jury as aforesaid of such issue. If any such incorporated company shall file such petition as aforesaid, then the court thereupon shall cause such jury to be empaneled for the trial of such claim; and the issues to be tried by such jury shall be the actual value of the land of such

claimant taken, if any, and the amount of damage to the land of such claimant not taken, by the public use thereof, and by the use of the land taken for the purposes for which it is taken, including all that the city may, from time to time, do or cause to be done with or upon the private property so taken or damaged. If two or more such incorporated companies interested in the land to be taken or damaged as aforesaid be entitled to trial by a common law jury as aforesaid, and shall make demand therefor as aforesaid, the court may, in its discretion, as may appear expedient, order that all such claims shall be tried at the same time before one jury, and further proceedings in the original cause shall be continued from time to time by the court until such issue or issues as to such incorporated companies shall have been determined by the verdict of such jury.

"Any party to such issue which may feel aggrieved by the verdict of said jury may, within four (4) days after the rendition of the same, file its motion for a new trial and in arrest of judgment, and said motion or motions shall be heard without delay, and after hearing the same, the court may overrule the same, or may order a new trial of such issue or issues on good cause shown; but no appeal from the judgment of the court overruling such motion shall be had therein until the final judgment of confirmation of the entire proceedings by the said court as hereinafter provided." Kansas City Charter, Article VI, § 147. (The city concedes that under § 147 a corporation has a right to elect to have its damages assessed by a common law jury. See City of St. Louis v. Roe, 184 Mo. 324, 83 S.W. 435.)

The Kansas City Charter further provides that the jury of freeholders shall ascertain the just compensation to be paid, and in case of claim for compensation shall

have been tried, determined and ascertained by a common law jury as therein provided, the jury of freeholders in said proceeding shall accept and adopt the valuation or assessment of damages by the common law jury, and incorporate the same as a part of the verdict rendered by the jury of freeholders. Kansas City Charter, Article VI, § 149.

The circuit court has the power on its own motion or on the motion of any party filed within four days after the rendition of the verdict of the jury of freeholders to set aside the verdict and appoint a new jury of freeholders to try the cause de novo and render a new verdict, but the verdict of any common law jury theretofore rendered in said proceeding fixing the compensation to be paid to any incorporated company shall be accepted and adopted by such new jury as a part of its finding and verdict. Kansas City Charter, Article VI, § 155.

Strange as it may seem, although the right of condemnees under special charter city condemnations to trial by a common law jury has been before this Court on many occasions, up to this time the equal protection of the laws question has either not been raised in the trial court and preserved for appellate review, or consideration of the point has not been given because the request for a common law jury was not timely made and therefore the question was held waived, or the case was decided on the basis of statutory construction. In City of Kansas City v. Vineyard, 128 Mo. 75, 30 S.W. 326, and In re Independence Avenue Boulevard (Kansas City v. Smart), 128 Mo. 272, 30 S.W. 773, requests by individual condemnees for trial by a common law jury of twelve based upon the comparable constitutional provision carried forward into the present state constitution as Article XI, Section 4, were denied and that action was upheld by this Court. The

question of equal protection of the laws was not raised or discussed in those cases. The rule that a common law jury was not necessary in eminent domain proceedings in special charter cities was reannounced in several cases,[1] but in none of these was the question of equal protection of the laws raised or decided.

In 1906 Justice William C. Marshall, in a dissenting opinion filed in Southern Missouri & A. Ry. Co. v. Woodard, 193 Mo. 656, 92 S.W. 470, 471-475, stated his unwillingness "to believe that the Constitution of this state intended that where the property of an incorporated company is to be taken by condemnation, a right of trial by jury is guaranteed to the corporation, and that the land of an individual, to be taken in the same proceeding, can be taken without the citizen being entitled to a trial by a jury." He considered that such a construction created a special class with special privileges, thereby discriminating in favor of corporations and against individuals. He said, "Under the construction heretofore placed by this court on section 4 of article 12, if two tracts of land adjoining each other are to be taken for a public purpose, and one of those tracts is owned by an incorporated company, and the other is owned by a private citizen, and both are used for identically the same purposes, for instance, both are used for ordinary business purposes, the unjust spectacle is presented by the laws of this state, as heretofore interpreted, of guarantying to the mere business corporation a trial by jury when its property is to be taken and of denying the right of trial by jury to the individual and permitting the property of the individual to be taken and the compensation to be assessed by a board of freeholders. The human mind is incapable of conjecturing any reason

1. City of Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S.W. 943; City of St. Louis v. Smith, 325 Mo. 471, 30 S.W. 2d 729; City of St. Louis v. Schopp, 325 Mo. 480, 30 S.W. 2d 733.

that could have actuated the framers of the Constitution in providing for such inequality before the law. * * * [A]ll men are equal before the law, and * * * it is contrary to the spirit and genius of our institutions that special privileges shall be conferred upon any class of the community. In the eye of the law an incorporated company stands upon no better footing than an American citizen. To create a special privilege in its favor is, in my judgment, as violative of our principles and theory of government as to say that all men with certain colored hair, or certain colored eyes, or of certain statute should be entitled, when their property shall be taken, to the benefit of trial by jury; but that all other persons in the community, who do not answer to that description might have their property taken either by the verdict of a jury or a board of freeholders as the law might direct."

In 1945, apparently in an attempt to equalize the situation, the General Assembly passed Laws 1945, p. 1072 (now § 523.060) providing that any plaintiff or defendant, individual or corporate, should have the right to trial by a jury of twelve persons upon filing exceptions to the award of commissioners in any condemnation case. This was followed, as above indicated, by the amendment of § 7240, RS 1939, Laws 1949, H.B. 2036 (now § 88.073 [2]).

Shortly thereafter individual condemnees, claiming the right to the assessment of damages by a common law jury, brought the question to this Court in In Re East Park Dist. of Kansas City (Kansas City v. Dougherty), 361 Mo. 829, 237 S.W. 2d 118. The Court considered the issue in the light of Laws of 1945, p. 1072, and newly enacted H.B. 2036 (1949), handing down two opinions, both of which upheld the denial of the right to trial of condemnees' exceptions before a common law jury, without the parties

having raised the constitutional questions now before the Court.

In State ex rel. Dennis v. Williams, 362 Mo. 176, 240 S.W. 2d 703 (1951), in St. Louis, a charter city, damages for a change of grade of several individuals were awarded under the charter provision for ascertaining damages by a condemnation commission of three persons. A circuit judge was about to try relator's exceptions without a jury of twelve, which relator had demanded. The landowner brought prohibition in this Court, on the basis of § 523.060, the provisions in Chapter 88 for assessment of damages by a jury, and the equal protection of the laws provision of Amendment XIV. One of relator's contentions was that "Statutes and charter provisions denying jury trial to individuals and granting same to corporations constitutes violation of equal protection of law under XIV Amendment, U.S. Constitution"; that to discriminate between corporations and natural persons violates this provision; that there are no real differences in the character and situation of the two classes of persons; that any arbitrary or unreasonable discrimination between the two classes with regard to matters of procedure constitutes a denial of equal protection of the laws. This Court, sitting en banc, reviewed the two opinions filed In Re East Park Dist. of Kansas City, supra, and on the basis of statutory construction decided that constitutional charter cities have the right, if they so elect, to condemn property for public use and to assess benefits and damages in the manner provided by its charter and that individuals do not have the right to a trial before a common law jury in a condemnation suit brought by a charter city in the manner provided by its charter. Special Judge Cave wrote the opinion denying prohibition, analyzing the opinions of Ellison and Dalton, JJ., in the East Park District case, supra, decided

the year before, concluding that both opinions for different reasons held that § 523.060 "does not *now* give to an individual defendant the right to a trial before a common law jury in a condemnation suit brought by a charter city *in the manner provided by its charter*," and that both opinions agreed that before the passage of § 523.060 the courts had uniformly held that a common law jury to try exceptions was not available to individual defendants where special charter cities proceeded in the manner provided by charter. Judge Cave found it "unnecessary again to discuss the constitutional provisions cited and relied on by relator," referring to the citations in Judge Ellison's opinion (which do not relate to the constitutional question now before us). Although the Court had an opportunity to pass upon the question of equal protection of the laws, it was passed over without decision.

Later, in City of St. Louis v. Gruss, Mo. Sup., 263 S.W. 2d 387, the equal protection of the laws question was not raised in the trial court, only in this Court; in an opinion by Dalton, J., it was ruled that the question was not before this Court and therefore the Court did not pass upon it. The opinion, however, hinted that the Court would seriously consider the contention if properly raised, in this language, p. 391: "* * * [W]e do not find that this court has held that a corporation is entitled to certain rights and the benefits of certain modes of procedure and that an individual similarly situated is not entitled to them," citing Backus v. Fort Street Union Depot Co., 169 U.S. 557, 18 S.Ct. 445, 42 L.Ed. 853, and McClung v. Pulitzer Pub. Co., 279 Mo. 370, 214 S.W. 193.

The question now having been specifically raised and properly preserved for appellate review, we will consider it.

"'Equal protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances. It is secured where a law operates on all alike, and does not subject the individual to an arbitrary exercise of the powers of government. This provision therefore prohibits discriminating and partial legislation, favoring particular persons or against particular persons of the same class. It guarantees equality, but not identity, of privileges and rights.'" Ex Parte Wilson, 330 Mo. 230, 48 S.W. 2d 919, 921.

Equal protection of the laws "* * * means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." Missouri v. Lewis, 101 U.S. 22, 31, 25 L.Ed. 989. (A corporation is a "person" within the meaning of the Fourteenth Amendment. Pacific Movement of the Eastern World v. Wright, Mo. App., 117 S.W. 2d 647).

The Fourteenth Amendment intended "* * * that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to * * * acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, * * *." Barbier v. Connolly, 113 U.S. 27, 31, 5 S.Ct. 357, 28 L.Ed. 923.

"An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protec-

tion of the laws." Backus v. Fort Street Union Depot Co, 169 U.S. 557, 571, 18 S.Ct. 445, 42 L.Ed. 853.

"* * * [T]he equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220.

"* * * [T]he guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so." Truax v. Corrigan, 257 U.S. 312, 333, 42 S.Ct. 124, 66 L.Ed. 254.

"And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." Reynolds v. Sims, 377 U.S. 533, 565, 84 S.Ct. 1362, 12 L.Ed. 2d 506.

The people of Kansas City in the enjoyment of their right of home rule may adopt in their charter, which is the organic law for the government of the municipality, whatever provisions for the exercise by the city of the right of eminent domain they see fit, free from control of the General Assembly, and their charter provisions have the same force and effect as an act of the General Assembly as long as they are consistent with the constitution and laws of the state (and the Constitution of the United States), and the courts when called upon must enforce these special charter provisions and can declare them invalid only if they violate constitutional limitations or prohibitions, or the general laws of the state. Kansas City v. Ashley, Mo. Sup., 406 S.W. 2d 584; City of Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S.W. 943, 946, 947. On the freedom of Kansas City to legislate on matters of local concern, limited only by the constitutions and general laws, see City of Kansas City v. Brouse,

Mo. Sup. en banc, ... S.W. 2d ..... (No. 56,131 decided June 14, 1971); State ex rel. Voss v. Davis, Mo. Sup., 418 S.W. 2d 163; Grant v. Kansas City, Mo. Sup. en banc, 431 S.W. 2d 89, 92. "* * * [I]t is settled law that when special charter provisions relating to procedure in condemnation cases are not inimical to the general scope of the policy of our Constitution and laws, then such special provisions govern as against the provisions of general law; * * *." Brunn v. Kansas City, 216 Mo. 108, 115 S.W. 446, 449.

The provisions of the Kansas City Charter clearly classify property affected by the exercise of the power of eminent domain according to the type of owner, individual or corporate, giving to corporate owners the right to have their damages ascertained by a common law jury of twelve persons or a freeholders' jury of six at the election of the corporation but limiting individual owners similarly situated to submission of their claims for damages to a jury of six freeholders. Classification of the subjects of legislation is not prohibited by the equal protection of the laws clauses of the United States and State constitutions "if all within the same class are included and treated alike," Brawner v. Brawner, Mo. Sup. en banc, 327 S.W. 2d 808, 815 [15]; Hammett v. Kansas City, 351 Mo. 192, 173 S.W. 2d 70, 72 [1], and cases cited; "if all persons in the same class are treated with equality," King v. Swenson, Mo. Sup. en banc, 423 S.W. 2d 699, 705 [9]. The general purpose of these constitutional provisions is to prevent invidious discrimination. King v. Swenson, supra. Discrimination is arbitrary and unconstitutional if the classification rests upon a ground wholly irrelevant to the achievement of the state's objective, Gem Stores, Inc. v. O'Brien, Mo. Sup. en banc, 374 S.W. 2d 109, 117; or which is not based upon differences reasonably related

to the purposes of the legislation. Petitt v. Field, Mo. Sup., 341 S.W. 2d 106, 109. The selection must be not merely possibly, but must be clearly and actually, arbitrary and unreasonable. Ballentine v. Nester, 350 Mo. 58, 164 S.W. 2d 378. The question is whether the principle of classification adopted rests upon some real difference, bearing a reasonable and just relation to the act with respect to which the classification is proposed. State ex inf. McKittrick ex rel. Ham v. Kirby, 349 Mo. 988, 163 S.W. 2d 990.

For many purposes corporations and individuals may be separately classified and subjected to different rights and burdens, 16 Am. Jur. 2d Constitutional Law, § 520, and in the field of eminent domain different rights may be granted to different classes of corporations and against different classes of property, and different methods of procedure may be prescribed for different classes of cases, where the classification is not arbitrary, unjust or unreasonable, 16A C.J.S. Constitutional Law § 509, but a classification which arbitrarily and unreasonably favors a corporation as against an individual, or vice versa, without any rational and material basis for the preference, is invalid both under the Fourteenth Amendment and Article I § 2 of the State Constitution.

Discrimination between condemnors and condemnees or between different condemnees, without any reasonable basis, has been frequently condemned as a violation of equal protection of the laws. Thus, a city charter allowing the city but not allowing landowners a right of appeal from the report of the commissioners appointed to appraise the condemned land was held a denial of equal protection in In re City of Rochester, 171 N.Y.S. 12, 184 App. Div. 369, aff. 121 N.E. 859, 224 N.Y. 659.

Laws differentiating between the rate of interest payable in state condemnation proceedings (6%) and the rate payable in municipal condemnation proceedings (4%), on delayed payments of just compensation, represent an arbitrary, unreasonable and improper classification of owners of property and a denial of equal protection, in view of the constitutional provision guaranteeing the same measure of just compensation to all owners of property. In re Manhattan Civic Centre Area, 291 N.Y.S. 2d 656, 57 Misc. 2d 156. And see City of Atlanta v. Sims, 210 Ga. 605, 82 S.E. 2d 130; City of Atlanta v. Wilson, 209 Ga. 527, 74 S.E. 2d 455.

In McClung v. Pulitzer Pub. Co., 279 Mo. 370, 214 S.W. 193, a statute providing that libel suits against corporations could be brought in the county where the plaintiff resides but that individual libelers could be sued only in the county where found was held to deny corporations the equal protection of the laws. The basis of the decision is that disadvantages were placed upon corporations charged with libel, without any reasonable basis; that there is no distinction or difference in fact between corporate libelers and individual libelers.

In Frost v. Corporation Commission, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483, a state statute regulating the business of ginning cotton for the general public for profit, which permitted an individual to engage in the business only upon his first making a satisfactory showing of public necessity for a license, but which allowed certain corporations to engage in the same business in the same locality without making such a showing, was held discriminatory against individuals in violation of the equal protection clause. Such a classification was deemed essentially arbitrary, being based upon no real or substantial differences

reasonably related to the subject dealt with by the legislation.

Again, in State v. Nashville, C. & St. L. Ry. Co., 124 Tenn. 1, 135 S.W. 773, a state statute forbidding any corporation from discharging any employee for voting or not voting at any election or for voting for or against any candidate or measure was held invalid under the equal protection clause. It was held discriminatory without natural or reasonable basis, and "vicious class legislation," because it did not apply to employers who were individuals, and its application was made to depend solely upon whether the employer was a natural or artificial person.

Tested by these rules and authorities the denial to these individual condemnees of their request for a trial of the issue of damages before a common law jury of twelve denied them the equal protection of the laws and equal rights and opportunity under the law in violation of the constitutional provisions invoked. Granting to a corporate owner of land the right to elect between a trial by a common law jury or a freeholders' jury but denying the same right to an individual landowner similarly situated clearly discriminates between the two types of owners without any rational basis for differentiation. It creates an artificial classification bearing no reasonable, just or proper relation to the object of the legislation, which is to arrive at just compensation for private property taken or damaged for public use. It creates an inequality as between persons within the same class (landowners subject to the exercise of the power of eminent domain by the city). It constitutes arbitrary selection and is unreasonable because there is no real or substantial difference between corporations and individuals when it comes to compensation of the owner of land for the taking or damaging of land.

To clarify the extent and the limits of the present holding: We are ruling that Article XI § 4 of the Constitution of Missouri, 1945, vouchsafing to corporations the right of trial by jury in all trials of claims for compensation when the rights of any corporation are affected by any exercise of the power of eminent domain, and Article VI of the Charter of Kansas City, must be read in conjunction with and in the light of the equal protection of the laws clause of Amendment XIV and the equal rights and opportunities clause of Article I § 2 of the State Constitution; that these constitutional provisions supplement said Article XI § 4 and Article VI and effectively equalize and coordinate the rights of individuals, placing individual rights in parity with corporate rights in this respect, and that the action of the circuit court in denying appellants' demand for a trial by a common law jury of twelve persons denied them equal protection of the laws and equal rights and opportunity under these constitutional provisions. We are not, however, declaring unconstitutional Article VI § 128 or any other provision of the Charter of Kansas City. We are not passing on the question whether the freeholder jury procedure constitutes due process of law. Our decision will not prevent the city authorities from continuing to use the freeholder jury procedure in eminent domain cases, except where a condemnee files a timely petition demanding a trial of his claim for compensation before a common law jury in the manner and under the conditions prescribed in Article VI, § 147 of the charter, in which event the demand must be respected. Except for appellants, our ruling is prospective only and shall apply to timely requests for trial by a common law jury made after the date of the publication of this opinion in the advance sheet of the Southwestern Reporter.

Landowners' second point is that the use condemned is a private, not a public, use. The purpose for which the city condemned easements through landowners' private property was to accommodate sewer and water lines to conduct sewage waste originating in the so-called White Oak Creek watershed of Kansas City and Raytown (an area of some 14.6 square miles) to sewage treatment and disposal facilities implementing the inter-municipal agreement between Kansas City and Raytown. One purpose was to eliminate certain private sewage lagoons which had been built by real estate developers in the late 50's and early 60's to provide sewage treatment facilities for sewage from lots being sold by various land developers in a portion of the watershed, which had been operated and maintained first by the developers prior to annexation of the area, then by a private non-profit corporation, and later by the city under an agreement with the corporation. The largest of three privately built lagoons was deeded to the city prior to the institution of the condemnation proceedings, and thereafter the users of the lagoons were charged by the city for sewer service. The facilities in question are not restricted to private use but are open for use by all affected members of the public in the entire watershed area. On the extensive evidence introduced, both oral and documentary, we sustain the trial court's finding that the use condemned is for public purposes.

Orders of November 3, 1969 and January 26, 1970, and judgment and decree of November 18, 1969 reversed and set aside. Cause remanded with directions to proceed to the trial of the claims of these appellants for compensation before a common law jury of twelve persons

or before a newly empaneled freeholders' jury, at their election.

Norwin D. Houser
Commissioner

PER CURIAM: The foregoing opinion by Houser, C., is adopted as the opinion of the Court en Banc.

REVERSED AND REMANDED WITH DIRECTIONS. Finch, C.J., Donnelly, Seiler, Holman, Bardgett and Henley, JJ., and Weier, Sp.J., concur; Morgan, J., not sitting.

APPENDIX B

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

Motion of Respondent for Rehearing or in the Alternative to Transfer to the Supreme Court En Banc

(Filed June 29, 1971)

Respondent moves the court for a rehearing in the above cause, or, in the alternative, to transfer said cause to the Supreme Court, en banc on the following grounds:

I

The Court in its opinion of June 14, 1971 inadvertently misinterpreted and overlooked the law and facts of this case by holding that an individual landowner is entitled to a trial by a twelve man common law jury, notwithstanding the Charter provision of respondent providing for a jury of six disinterested resident freeholders for the ascertainment of just compensation in eminent domain cases brought under the special Charter procedure of respondent, while a *for-profit* incorporated company is entitled to a twelve man common law jury at its election, for the reason that such individual landowner is not denied equal protection

of the laws as there is a reasonable and legitimate classification for procedures in eminent domain proceedings.

II

The people of the State of Missouri in voting for the Constitution of the State provided therein for incorporated companies to have the right to trial by jury in eminent domain cases; that the people of Kansas City (respondent) in voting to adopt its Constitutional Charter followed the Constitutional provision regarding incorporated companies but also provided that for its exercise of the power of eminent domain that such compensation should be determined by a jury of six disinterested resident freeholders of the city, all as a matter of local concern; that the reason for the classification was based on the fact that railroads and other public utilities were vested with limited powers of eminent domain in order to carry out their public service purposes, whereas individuals do not possess the power of eminent domain except in the cases where a way of necessity is required to utilize landlock parcels of property. That the court without any precedent has denied respondent the right to legislate the form of procedure to be used in eminent domain proceedings, that is, it has effectively denied the use by respondent of its charter procedure and placed it under Chapter 523, R.S.Mo., 1969 (Rule 86 Mo. Sup. Court Rules) or Chapter 88, R.S.Mo., 1959, even though respondent through its legislative body can elect to proceed under such statutory procedures.

III

The respondent respectfully moves the court in alternative to transfer this cause to the Supreme Court en banc for the following reasons:

A. A federal question is involved in this case which is as follows:

Appellants claimed that they were denied equal protection of the laws as guaranteed by Section 1, Amendment XIV of the Constitution of the United States and denied equal rights and opportunities under Article I, Section 2 of the Constitution of Missouri by not having their claim for compensation determined by a twelve man common law jury, notwithstanding the provisions of respondent's Constitutional Charter providing for a jury of six disinterested resident freeholders to ascertain compensation for individual landowners; that the opinion and decision of this court decided a federal question adversely to respondent's claim aforesaid and by virtue of Article V, Section 9 of the Constitution of Missouri, said cause should be transferred to the court en banc.

B. The question involved in this case is of such general interest and importance that the final decision thereon should be made by the Supreme Court en banc. In support thereof respondent states:

1. Said decision, while being controlled by the question of a claimed denial of equal protection of the laws with respect to procedures in eminent domain cases, is contrary to the law *and results* reached in other en banc decisions rendered by this court.

2. That the effect of this decision is to deny respondent the *legislative discretion* of exercising its right to select the mode of procedure used in condemnation proceedings brought under its Constitutional Charter, rather than under State statutes, thus, denying respondent one of the necessary exercises of discretion under its home rule charter.

3. The opinion was not only written without regard to or reference to the controlling authority cited by respondent from other jurisdictions, but also quoted from authorities from other jurisdictions with respect to the question of denial of equal protection, and therefore, the existing law concerning this point should be reexamined by the Supreme Court en banc.

WHEREFORE, the respondent respectfully requests this court to grant it a rehearing in this case, or in the alternative, to transfer the cause to the Supreme Court en banc.

Respectfully submitted,

Aaron A. Wilson
City Counselor

By /s/ Ned B. Bahr
Associate City Counselor
2800 City Hall
Kansas City, Missouri 64106
Attorneys for Respondent

Copy of foregoing Motion with attached Suggestions delivered by ordinary mail, postage prepaid to William Poindexter, Attorney at Law, 801 Broadway, Kansas City, Missouri 64106, and Phillip Baker, Attorney at Law, 319 W. Kansas, Independence, Missouri 64050, this 29th day of June, 1971, Attorneys for Appellants.

/s/ Ned B. Bahr

APPENDIX C

IN THE SUPREME COURT OF MISSOURI
COURT EN BANC

Notice of Intent of Respondent Kansas City, a Missouri Municipality, to Seek Writ of Certiorari from Supreme Court of United States to Supreme Court of Missouri, En Banc, and Motion for Stay of Execution of Mandate

Now comes Kansas City, a Missouri Municipality, condemnor and respondent herein, by its attorneys, Aaron A. Wilson, City Counselor, and Ned B. Bahr, Associate City Counselor, and does by these presence make known to this court and counsel for appellants William K. Poindexter and Phillip Baker, its intention to seek a writ of certiorari from the Supreme Court of the United States directed to the Supreme Court of Missouri, en banc.

That for its motion for stay of execution of the mandate of this court filed on March 13, 1972 therein adopting the divisional opinion entered by Division 1 of this court on June 14, 1971, respondent, the aggrieved party herein, states that an important federal question was decided adversely to respondent and that because of its importance respondent should have the opportunity to have the highest court in the land make a final determination thereof.

WHEREFORE, Kansas City, a Missouri Municipality, respondent herein, prays an order of this court granting it the time allowed by law within which to file its petition for writ of certiorari in the United States Supreme Court directed to the Missouri Supreme Court, En Banc, for a review and determination of the mandate filed March 13, 1972 in the above styled causes (appeals); that in conjunction therewith respondent also prays for an order granting a stay of execution of the mandate filed on March 13, 1972

for the time allowed by law for the filing of its petition for writ of certiorari aforesaid.

Aaron A. Wilson
City Counselor

By /s/ Ned B. Bahr
Associate City Counselor
2800 City Hall
Kansas City, Missouri 64106
274-1210

Attorneys for Kansas City, a Missouri Municipality, Condemnor and Respondent herein.

I hereby certify that I caused to be sent by ordinary mail, postage prepaid, a copy of the foregoing notice and motion to Mr. William K. Poindexter, Attorney at Law, at 801 Broadway, Kansas City, Missouri 64105 and Mr. Phillip Baker, 319 West Kansas Avenue, Independence, Missouri 64050, Attorneys for Appellants, this 20th day of March, 1972.

/s/ Ned B. Bahr
Associate City Counselor
Attorney for Respondent

APPENDIX D

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Jefferson City, Missouri
65101

Thomas F. Simon
Clerk

Telephone
636-3715

March 23, 1972

Mr. Ned B. Bahr
Associate City Counselor
2800 City Hall
Kansas City, Missouri 64106

In re: Condemning Private Property for Public Use for Sewer and Water Rights in Kansas City, Missouri and Providing for Payment of Just Compensation therefor under Ordinance No. 35677, Passed August 9, 1958. Kansas City vs. Claude G. Webb, et al—No. 55230-55432

Dear Sir:

This is to advise that the Court has this day entered the following order in the above-entitled cause:

"On application of respondent, mandate ordered stayed ninety (90) days from this date."

Yours very truly,
/s/ Thomas F. Simon
Clerk

/GK
cc—
Mr. William K. Poindexter, Attorney at Law, 801 Broadway, Kansas City, Missouri
Mr. Phillip Baker, Attorney at Law, 319 West Kansas Avenue, Independence, Missouri 64050